

HOME RULE AND EXCLUSIONARY ZONING: AN IMPEDIMENT TO LOW AND MODERATE INCOME HOUSING

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I. INTRODUCTION

Unquestionably, part of the suburban devotion to home rule is the fear that the white noose around the growing Black populations of the central cities might be loosened, if the municipalities were to lose their 'home rule' control over such services as zoning and rent or housing subsidies.¹

One of the agonizing paradoxes of all too many contemporary reform ventures is that by the time they achieve formal success, be it legislative adoption or judicial recognition, they are already outdated solutions to past problems. In fact, the political consensus traditionally necessary for enacting legislative reforms is often aided by those who self-consciously seek to stem the tide of more profound, and hence more disturbing, change. Thus, it frequently happens that the proposal which is adopted today as the hopeful solution to yesterday's problem becomes one of the causes of tomorrow's discontent. Conspiratorial and political machinations aside, the technological burden of accounting for the myriad of facts and policies which must be considered in undertaking any conscious program for social change makes it a wonder that we "muddle through" as well as we do; some analysts have suggested that reform on the grand scale is now an anachronism.²

Current concern with the appropriate scope of home rule power over land use controls presents an example of two contemporary reform movements which have become "part of the problem" rather than the means of providing solutions to the housing needs of low and moderate income families in and about our large urban centers. Ohio is not exempt from this development, nor is it an uniquely Ohio problem. Therefore, in addition to delineating the circumstances peculiar to the Ohio context, it will be fitting to consider developments in other jurisdictions. Let us begin with a brief sketch of the origins and goals of the two reform movements whose convergence has produced what the Douglas Commission has called "the white suburban noose around the inner city . . ."³

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¹ W. D. HEISEL AND I. O. HESSLER, *STATE GOVERNMENT FOR OUR TIMES, A REPORT TO THE STEPHAN H. WILDER FOUNDATION* 49 (1970).

² Hirschman and Lindblom, *Economic Development, Research and Development, Policy Making: Some Converging Views*, 7 *BEHAVIORAL SCIENCE* 211, 215-16 (1962).

³ *BUILDING THE AMERICAN CITY, THE REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES*, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. 1 (1968).

II. THE HOME RULE REFORM MOVEMENT

In order to understand the controversy over and enthusiasm for the establishment of home rule, the relationship between state government and local governments must be understood. In contrast to the federal system in which the states have plenary sovereignty except in so far as expressly limited by the United States Constitution, local governments have no inherent sovereign powers; they are deemed to be the creatures of the state government and enjoy only those powers delegated by the state constitution or legislative act. While there have been occasional assertions of "an inherent right of local self-government," these have gained only limited acceptance by courts or theorists,⁴ and the classic statement of municipal subordination found in Dillon's Rule expresses clearly the dominant, if not universally accepted, view.⁵

Of course, the formal subordination of local government to the state does not mean that, in practice, municipal corporations did not enjoy considerable independence even before the establishment of home rule; inertia, the pattern of diffuse settlement of cities within the States, and indifference have always contributed to a sizable amount of local independence. Even so the formal power relations proved vexing to local communities when state legislatures found it in their interest to intervene in local affairs and to attempt to control, on occasion, even the most minute details of municipal government. State intervention in the affairs of local communities no doubt often reflected the pursuit of lofty goals such as establishing uniform levels of municipal services throughout the state, making available the efficiency and expertise of centralized planning and regulation, and providing protection against local political skulduggery, but this far-

⁴ For an early exposition of the thesis that there is an inherent and traditional right of local self-government, see Judge Cooley's opinion in *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 94-108 (1871). Apparently Michigan no longer offers a hospitable climate for this doctrine. See *Highland Park v. Fair Employment Practices Comm'n*, 364 Mich. 508, 111 N.W.2d 797 (1961). Additional arguments in support of the proposition will be found in Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900), and in McQuillan, 35 AM. L. REV. 510 (1901); in rebuttal, see McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190 (1916).

A recent opinion of the Nebraska supreme court, in a case involving the claim that extra-territorial zoning should be declared void because the people subject to the zoning restrictions had no voice in the selection of the city officials who enacted the ordinance stated that "[s]uch persons . . . have neither a constitutional nor inherent right to local self-government." *Schlienz v. North Platte*, 172 Neb. 477, 490, 110 N.W.2d 58, 66 (1961).

⁵ No article dealing with any aspect of home rule can escape a statement of Dillon's Rule: A municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

1 DILLON, MUNICIPAL CORPORATIONS § 237, at 449 (5th ed. 1911).

reaching power apparently was also seen as a source of personal profit by some state officials and this was particularly aggravating.⁶

The home rule reform movement had additional strings to its bow: not only would municipal home rule serve as a welcome antidote to the perceived prodigious corruption at the distant state house, but it also would free legislators from the time-consuming burdens of local affairs, thus making it possible for them to confront the rapidly increasing list of problems posed by a developing industrial society. Attention to the affairs of local government, it was argued, accomplished little of benefit to the citizenry and diverted the state legislature's energy and focus away from the compelling need to establish the mechanism for regulating irresponsible business practices, providing for industrial peace and safety, and similar significant obligations. Thus, the movement toward establishing home rule shared values in common with the establishment of general laws of incorporation and the imposition of restrictions upon local or special legislation.

Advocates of municipal home rule have consistently capitalized upon the persistent theme of political self-determination found in American political theory and rhetoric, starting with the debates on the establishment of the federal government, through the development of a system of self-government for America's domestic colonial empire,⁷ down to the current fascination with municipal decentralization.⁸ After all, we all know that we can do a better job regulating our own affairs than those in Washington, Sacramento, Albany, or even Columbus; and even if we can't, since we live with the mistakes of governmental folly, only local control offers any significant manner of local redress for local grievances. Statewide officials, even in situations where they have control over affairs in local communities, are seldom elected on the basis of their record with respect to local affairs, nor do they campaign on what are distinctly local issues.

Two mechanisms for establishing home rule authority have been tradi-

⁶ McBain reports the following description of practices found prevalent in the state of New York:

Cities were compelled by the legislature to buy lands for parks and places because the owners wished to sell them; compelled to grade, pave, and sewer streets without inhabitants, and for no other purpose than to award corrupt contracts for the work . . . laws were enacted abolishing one office and creating another with the same duties, in order to transfer official emoluments from one man to another; and laws to change the function of officers with a view only to a new distribution of patronage, and to lengthen the terms of offices, for no other purpose than to retain in place officers who could not otherwise be elected or appointed.

H. L. MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* 9 (1916). We must remember that the last quarter of the 19th century, with its prodigious increase in population and commensurate growth in cities has been characterized by Vernon Parrington as the period of the "great national barbeque."

⁷ Conventional nomenclature refers to "the establishment of territorial government," e.g., in the Northwest Territory.

⁸ See, e.g., Babcock and Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 *LAW AND CONTEMP. PROB.* 220 (1967).

tionally utilized: (1) A constitutional limitation upon the power of the state legislature to act in regard to municipal affairs; and (2) a delegation of authority to municipalities to act in matters of local affairs without the need for specific prior legislative approval. While there may be instances when it is appropriate to prohibit state intervention and to grant blanket authority to local governments to act without prior and specific legislative authorization, there are many instances in which the grant of local initiative is more properly subject to the ultimate powers of the state to act with controlling authority when it chooses to do so. Thus, those who advocate an expansion of home rule power to achieve local initiative by means of a broad and generalized delegation of authority from the state frequently accept a limitation on this initiative if and when it conflicts with an exercise of state power.⁹

Ohio adopted its home rule amendment in 1912 and a detailed analysis and exposition of the convention proceedings pertaining to home rule are presented in Dean Fordham's article which appeared in a previous issue of this journal and will not be re-examined here, although we shall later return to some of the specifics of the Ohio home rule provisions.¹⁰

III. THE ZONING REFORM MOVEMENT

The institution of private property has consistently been a basic tenet of "the American way of life," but few of that sacred institutions's most ardent supporters are prepared to endorse Blackstone's prescription that "the regard of the law for private property is so great that it will not authorize the least violation of it; no, not even for the general good of the whole community."¹¹

The history of the common law is replete with examples of the state's intervention to regulate the use of private property in the interest of community well-being. For example, modern building codes find their antecedence in such Seventeenth Century English legislation as that statute adopted after the great fire of London which set forth the "rules and orders of building."¹²

Moreover the common law of nuisance has consistently imposed restraints upon land owners to protect the rights of both their immediate neighbors and the general public from unreasonable uses of private property. Based upon these precedents we are not surprised to learn that as early as 1799 the Supreme Court of Pennsylvania sustained an ordinance

⁹ For a discussion of the virtues of a broad grant of municipal initiative see Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 652-658 (1964).

¹⁰ Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948).

¹¹ 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 139 (Jones, ed. 1916).

¹² An Act for Rebuilding the City of London, 19 Car. 2, c. 3 (1666).

which prohibited the construction of wooden buildings in areas of heavy concentration within the city of Philadelphia,¹³ and that the United States Supreme Court upheld municipally imposed limitations on the height of buildings in Boston,¹⁴ and also upheld ordinances banning commercial livery stables and the manufacture of bricks in urban areas.¹⁵

The use of individual ordinances, each aimed at a specific and narrowly enumerated prohibition, proved to be an inefficient device for controlling the chaotic character of America's developing urban centers, and, in 1916, New York City's Board of Estimate adopted the first comprehensive attempt at regulating urban growth and land use patterns. The New York Building Zone Resolution was addressed to the problems of safety from fire, provision of adequate light and air for dwelling users and the maintenance of convenient access to buildings, and was enacted under the authority of the police power to provide for the general welfare, public health and public safety. Separate districts were provided for residential and business uses, with a third district left for unrestricted use. These districts were designated on a map in order to provide advance notice to potential developers, thus alleviating much of the unpredictability of traditional nuisance law. Height restrictions and limitations on maximum lot coverage were applied throughout the city. When, in 1920, the New York Court of Appeals upheld the building zone resolution¹⁶ the zoning reform movement received a significant send off. Litigation which arose in Ohio provided the imprimatur of the United States Supreme Court in 1926 when Mr. Justice Sutherland wrote the majority opinion sustaining the zoning ordinance of the Village of Euclid which, among other things, banned apartment buildings from single family residential districts, putting to rest the contention that such comprehensive regulations violated federal standards of due process by unduly restricting the rights of property owners.¹⁷

The ameliorative contribution of zoning to the threatening conditions of the urban life is set forth by the court in language typical of the proselytizers of the zoning reform movement:

[it] will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; . . . it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce

¹³ *Respublica v. Philip Urban Duquet*, 2 Yeates 493 (1799).

¹⁴ *Welch v. Swasey*, 214 U.S. 91 (1909).

¹⁵ *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

¹⁶ *Lincoln Trust Co. v. The Williams Bldg. Corp.*, 229 N. Y. 313, 128 N.E. 209 (1920).

¹⁷ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). A strong reliance upon the analogy with the nuisance doctrine permeated the opinion, and added significantly to our understanding of that murky field, e.g.: "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Id.* at 388.

or intensify nervous disorders; preserve a more favorable environment in which to rear children¹⁸

With respect to the particular question of excluding apartment houses from single-family residential districts, the court waxed rhapsodically that

. . . very often the apartment house is a mere parasite . . . interfering by [its] height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as [its] necessary accompaniments, the disturbing noises incident to increased traffic and business . . . thus detracting from [its] safety and depriving children of the privilege of quiet and open spaces for play¹⁹

Thus, the emphasis in the court's opinion, as in the reform literature of the day, stressed the humanistic goals of endowing urban life with the virtues of rural living—open spaces, freedom from noise and congestion, and a safe place for children to play. Little stress was placed upon the utility of zoning as a means of stabilizing and preserving property values in developing areas. However, this was a major theme in the numerous tracts, and public presentations of the advocates of zoning, especially when confronting business and real estate groups understandably suspicious of expanding the authority of the state to regulate the use of private property, a practice which sounded mildly socialistic to some.

Aided by a favorable decision in the *Euclid* case and with the official endorsement of the United States Department of Commerce, the zoning reformers virtually blanketed the countryside in the next two decades, to the point where the city of Houston, Texas, remains the single holdout among sizeable American cities from the persuasiveness of the reformers' arguments.²⁰

Two words of caution, if not apprehension, attended the reformers' victory in the *Euclid* case. Judge Westenhaver made a prescient observation in the trial court decision in *Euclid* when he said that

the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons . . . live in a single-family dwelling and others . . . in an apartment . . . is primarily economic. It is a matter of income and wealth²¹

Because the ordinance in question would further such "class tendencies" and otherwise deprived the plaintiff of property without just compensation, Judge Westenhaver declared the ordinance null and void.

While the United States Supreme Court did not appear particularly

¹⁸ *Id.* at 394.

¹⁹ *Id.*

²⁰ The early history of the zoning reform movement is told in great detail and with considerable style in S. I. TOLL, *ZONED AMERICAN* (1969).

²¹ *Ambler Realty Co. v. Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

concerned about the tendency of zoning to encourage economic segregation, it did acknowledge the possibility that regulations enacted by the Village of Euclid, while serving the best interests of Euclidians, might do so at the expense of persons in surrounding communities. The court explicitly recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."²²

Thus, it is clear that at the baptism, if not the birth, it was apparent that the zoning reform movement had within it the potential for elitist and isolationist mischief. Now that zoning has reached middle age, it has come under increasing attack as being antithetical to democratic values. Because zoning in Ohio, as in all other states with the single exception of Hawaii, is administered primarily at the local level, we are brought full circle again to a consideration of home rule. However, before proceeding further let us examine, in brief, the accusation that the zoning power is used to achieve economic segregation in our communities.

IV. EXCLUSIONARY ZONING:²³ MEANS AND ENDS

Exclusionary zoning serves several purposes in the eyes of its supporters, some perhaps more ethically justifiable than others. No doubt, there are those who seek to keep "their" community racially homogeneous and see all potential moderate and low income neighbors as either black, or otherwise racially tainted. Having lost the civil rights fight in the legislative halls and in the courtrooms at state and national levels, they now take recourse in whatever local power they may conveniently misuse. Another group of supporters of exclusionary zoning, while not racially bigoted, seek to avoid unnecessary contact with members of a "lower" socio-economic class. Still another reason for embracing exclusionary zoning is that of fiscal self-interest, founded on the belief that apartments, mobile home parks, duplexes and even smaller single family dwellings do not pay their own way, *i.e.* these living arrangements do not provide sufficient real property tax revenues to balance out the tax-consuming capacities of their inhabitants. If the residences of low and moderate income families do not produce sufficient revenue to pay the costs of providing schools, sanitary facilities, recreation and fire and police protection, then the inevitable result is that the community's more affluent members will have to absorb the burden, or alternatively, see the quality of services rendered diminished. None of the aforementioned positions necessarily presupposes misanthropy or animus toward those excluded. It may reflect nothing more than a disin-

²² *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

²³ The terminology employed often reflects the point of view of the speaker. The synonym "snob zoning" probably reflects the sense of indignation felt by some critics of present practices, while "fiscal zoning" better fits the apologist's lexicon.

clination to shoulder additional economic burdens or experience unwanted social trauma.

From the perspective of those barred from a community by exclusionary zoning practices, the motives or intentions behind the municipal regulations are, for practical purposes, irrelevant. Similarly, in terms of the impact upon the communities in which the excluded are presently living, or those in which they ultimately settle, is concerned, again motives are of minor significance. The harm to the low or middle income family which is effectively excluded may take several forms. It may mean that suitable employment is put beyond the geographic reach of a wage earner, or at least that it will require an excessive investment in time and money traveling to work.²⁴ In terms of the stated goals of the zoning reformers, the excluded low and middle income family may be deprived of suitable amenities such as open space, fresh air and sunlight, recreational facilities, and freedom from the acute pressures of high density living. If the family excluded is black or a member of another racial minority, then another consequence will be that of impeding attempts at overcoming racial segregation and isolation, an eventuality which may have particularly significant impacts upon educational patterns and opportunities for social mobility.

Exclusionary zoning practices may inflict costs upon neighboring communities as well as upon the particular individuals excluded. If it is true that low and moderate income families do not generate sufficient real estate tax revenues to pay the costs of the services they consume, then the exclusionary practices of one community are tantamount to imposing a tax upon the community which is compelled, by want of any alternative, to serve as the host for low and moderate income families. There may be instances when, due to the presence of a large amount of tax-producing industrial or commercial property, a community is well able to afford the cost of large numbers of low and middle income families settling within its borders, but under the present system such a result is most likely mere happenstance. Additionally, if racially integrated neighborhoods²⁵ are desirable, or at least ought to be obtainable, then to the extent that exclusionary practices impede their establishment, the entire social system suffers. Similarly, if overcrowding or the other inadequacies of blighted older neighborhoods sap the vigor and health of the poor, then additional costs are imposed upon society at large. Quite clearly what may appear to be good for an exclusive suburban community may not serve the needs of the total body politic.

Given a goal of excluding low and moderate income families, the available techniques are legion. For example, there is the practice of zoning

²⁴ As more and more factories and businesses relocate in suburban communities this has become an increasing problem, and one exacerbated by the sorry state of public transportation in most communities.

²⁵ Such neighborhoods are most likely to produce racially integrated schools without busing.

residential districts exclusively for single family homes and excluding all duplexes, apartments and mobile homes. Having banned outright the less expensive housing options, a community might then increase the costs of single-family houses by such means as establishing excessive minimum lot sizes, minimum house sizes, and even minimum prices for housing. Of course zoning is not the only exclusionary technique available to those intent upon such a goal, and subdivision regulations may also be manipulated to increase the cost of housing beyond the means of moderate and low income families. This is certainly the consequence of loading the cost of underground utilities, school and recreational sites, sewer and drainage facilities, and roads and sidewalks onto the subdivision developer who quite naturally will attempt to pass these costs on to the ultimate consumer. The common technique of using variances and zoning amendments for leverage serves to further frustrate the development of low and moderate income housing projects.²⁶

V. EXCLUSIONARY ZONING: RESPONSES AND REMEDIES

What is "the answer" to exclusionary zoning? The first step is frank recognition of the existence of a problem.²⁷ From that point on paths diverge depending upon the circumstances. For example, in states in which the power to zone rests solely upon a legislative delegation from the state to the local community, the state legislature has it within its power, by enacting suitable amendments to the state's zoning enabling act, to develop countervailing forces to the tendencies of the local governments to enact exclusionary provisions. A state might provide for an administrative appeals agency to which claims of exclusionary zoning might be taken and which is vested with the authority to override local zoning restrictions in appropriate cases.²⁸ Another alternative open to the state legislature is to amend the zoning enabling act and include specific prescriptions concerning the nature of the "general welfare" to be served under the delegated authority, thus emphasizing the obligation of each local community to exercise self-restraint when its conduct externalizes costs;

²⁶ There is a vast body of literature which has sprung up in the last several years describing and analyzing the techniques of exclusionary zoning. See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); BROOKS, EXCLUSIONARY ZONING (American Society of Planning Officials, Planning Advisory Service, 1970); Symposium: *Exclusionary Zoning*, 22 SYR. L. REV. 465-536 (1971). Norman Williams raised the issue fifteen years before it became fashionable in Williams, *Planning Law and Democratic Living*, 20 LAW AND CONTEMP. PROB. 317 (1955).

²⁷ Accepting Professor Banfield's plea to avoid "semantic confusion," I still opt for "problem" rather than describing exclusionary zoning as a matter of mere "comfort, convenience, amenity, and business advantage." See E. C. BANFIELD, *THE UNHEAVENLY CITY*, at 4 (1970).

²⁸ This is essentially the technique adopted in Massachusetts. See Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246 (1970).

when local communities fail to exercise suitable restraint, the state judiciary must be relied upon to police the system.²⁹

Another approach, available at the state level, is modeled after the voluntary system adopted by the Miami Valley Regional Planning Commission's Housing Distribution Plan,³⁰ an unusual program for the imposition of quotas for the construction of new housing for low and moderate income based upon a statistically derived "fair share" formula. This approach emphasizes the essential equity of distributing the indirect costs of subsidizing low and moderate income families throughout a region or a state. As a voluntary venture, it is based upon the optimistic assumption that we are a people of good will, each willing to do his share so long as there is an assurance that one's neighbor will also assume a fair share of the burdens of society. The advantage of a housing distribution plan over the two alternatives previously mentioned is that, rather than responding to individual complaints on an *ad hoc* basis, this system anticipates housing needs and plans for their fulfillment on a comprehensive and systematic basis. In states in which zoning authority is exercised under a legislatively delegated home rule power, such a fair share distribution plan could be imposed upon local communities and administered through either a state agency or regional agencies.

A fourth alternative is exemplified by the New York State Urban Development Corporation which has the authority to build needed housing in local communities and is immune from local zoning regulations. But while it may possess the same potential for planning that a housing distribution plan has, there are fewer guarantees that the agency apply an equity principle in selecting communities in which it actually constructs low and moderate income housing. Moreover, it is a highly centralized operation, and while it could be organized and operated on a regional basis, the one model in existence has not followed that pattern.

Taking a somewhat narrower focus one can conceive of a state imposing "an off-site housing requirement" on the developers of large-scale industrial enterprise in suburban communities similar to the traditional imposition of off-street parking requirements on those who develop commercial and industrial uses. This notion also employs an equity principle based on the belief that if a business enterprise finds it profitable to locate in a suburban community, then it ought to carry the responsibility of providing housing sites for its workers rather than leaving them as a perpetual burden to a neighboring community, which does not obtain the benefits of the

²⁹ One author has suggested that the judiciary take the lead in so construing delegated authority, even without legislative clarification. See Note, *Removing the Bar of Exclusionary Zoning to a Decent Home*, 32 OHIO ST. L.J. 373 (1971).

³⁰ Bertsch and Shafor, *A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience*, 1 PLANNERS NOTEBOOK (American Institute of Planning, 1971); Craig, *The Dayton Area's 'Fair Share' Housing Plan*, CTRY (Jan./Feb., 1972).

newly created industrial tax base. An alternative analogy which would support this kind of legislative imposition is the requirement that subdivisions dedicate land to be used for meeting educational and recreational needs of the subdivision's residents.

As a final alternative, we should not fail to notice the potential consequence of recent litigation challenging the reliance upon the local real property tax base for financing public education. To the extent that fiscal considerations make exclusionary zoning a natural result of a community's perceived self-interest, then shifting the cost of education, the single largest cost factor of local government, to a regional or statewide basis should ease the pressure to exclude low and moderate income families. It is too early to say with any certainty just what the legislative response will be to the *Serrano*³¹ type decisions, but they may lend an unanticipated assistance to those attempting to crack the exclusionary barriers surrounding so many suburbs.

Turning now to the more frequently encountered stance at the state capitol, *i.e.* either hostility or indifference to state action to overcome exclusionary zoning,³² the natural alternative is recourse to litigation. A substantial amount of litigation has occurred in the past five years, much of it either assisted or sanctioned by such organizations as the Suburban Action Institute, the National Committee Against Discrimination in Housing, and the NAACP's Legal Defense Fund.³³

No attempt to review this litigation will be undertaken here. The litigation has proceeded on a wide variety of theories, ranging from assertions that exclusionary zoning aids and abets both racial and economic segregation in violation of the fourteenth amendment of the United States Constitution, to the more mundane grounds on which so many zoning ordinances are attacked—that they impose unreasonable and confiscatory burdens upon the land owners whose rights of private property are infringed upon. In this latter instance we frequently see the interest of the civil rights advocate and the housing entrepreneur coincide, an unusual if not unwelcome occurrence. Additionally, the *Serrano* decision³⁴ has encouraged attacks upon the notion that the state may constitutionally delegate authority to local communities to act in their own self-interest at the expense of the interest of the "general welfare." Dating back to Mr. Justice Sutherland's admonition in the *Euclid* case that there were instances when the local community had to give way to the needs of the broader community, *Serrano* suggests that claims of areal equal protection may

³¹ *Serrano v. Priest*, 5 Cal. 3d 584, 478 P.2d 1241, 96 Cal. Rptr. 601 (1971).

³² This should not be an unexpected response insofar as suburbanites tend to exert a steadily increasing influence in state legislative chambers.

³³ The law review literature on this litigation is voluminous, and the interested reader is urged to consult the Index to Legal Periodicals under "zoning" or "constitutional law."

³⁴ *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

offer a useful leverage point for combating exclusionary zoning practices by local governments.

VI. HOME RULE AND LEGISLATIVE AUTHORITY TO COMBAT EXCLUSIONARY ZONING IN OHIO

In states in which the home rule power is strictly the creation of the legislature, abuse in the exercise of delegated authority is subject to correction at the legislature's pleasure. All that is needed is the appropriate legislative majority and a wise choice of remedy. In Ohio the situation is somewhat more complicated due to the constitutional basis upon which the home rule power of municipalities stands. The very act of including a provision on home rule in the constitution presupposes a commitment to impose some limitation upon state legislative interference with local self-determination. This is entirely consistent with the history of the home rule movement as previously described.

An examination of the language in which Ohio's home rule provision is cast, as well as the records of the constitutional convention of 1912,³⁵ indicates that something less than total local autonomy was intended. With respect to "local police, sanitary and other similar regulations," § 3 of art. 18 of the Ohio constitution expressly imposes the limitation that such local enactments not be in "conflict with general laws" and also confines enforcement of such ordinances to the municipalities' "limits."

On the other hand, the grant of "all powers of local self government" is not so conditioned, and in this province it would appear that municipalities have constitutional sovereignty and independence from legislative power.³⁶

Given the language of § 3, art. 18, of the Ohio constitution and the case law interpreting it, would it be constitutionally permissible for the Ohio General Assembly to assert itself in an attempt to curb the exclusionary tendencies of local zoning regulations?³⁷ While the answer to this question is not altogether clear, there is substantial reason to believe that the General Assembly does possess adequate power at this time and that art.

³⁵ Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948) offers a summary of the pertinent portions of the massive two volume work, *PROCEEDINGS AND DEBATES OF THE OHIO CONSTITUTIONAL CONVENTION*, with respect to the question of home rule.

³⁶ The case law has drawn distinctions between municipalities which have adopted a home rule charter and those which have not, and insofar as municipalities which have not adopted home rule charters are concerned, between matters of "procedure" and "substance" insofar as the grant of "powers of local self government" confers an immunity from state intervention. The history of these distinctions as well as the current status of the law is discussed exhaustively in Vaubel, *Municipal Corporations and the Police Power in Ohio*, 29 OHIO ST. L.J. 29 (1968) and Vaubel, *Of Concern to Painesville—or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L.J. 257 (1972); and Duffey, *Non-Charter Municipalities: Local Self Government*, 21 OHIO ST. L.J. 304 (1960).

³⁷ For purposes of this discussion we may assume that any one of the aforementioned remedies are contemplated. See text at notes 29-32, *supra*.

18, § 3 does not impose a constitutional bar to enacting remedial legislation. Let us examine this question in greater detail. If a municipality's zoning regulations were adopted under the clause of art. 18, § 3, which confers the power "to adopt and enforce within their limits such local police, sanitary and other similar regulations," then clearly the proviso that such police power regulations not be "in conflict with general laws" of § 3 recognizes the overriding power of the state. In short, if zoning is an exercise of the police power,³⁸ then the state may combat local exclusionary practices by enacting "general laws" dealing with the problem. Thus, the state itself might enact and administer zoning regulations entirely as a state function, although the detail and specificity of such regulations suggest that this approach is somewhat unlikely, if not impossible, in Ohio.³⁹

While leaving the initial responsibility for laying out zoning districts and establishing standards and criteria to the local community, the state might assume an active role as a "super appeals board" to adjudicate administratively contentions that local zoning authority is being used in an exclusionary fashion. Similarly, the state might mandate a housing distribution plan or adopt a system of statewide licensing for all developments or projects over a designated size, alternatives clearly within the realm of practicality at the administrative level. One example of state intervention under the police power which has deprived local communities of some of their regulatory powers is exemplified by Ohio Revised Code §§ 3733.01 *et seq.*, which provide for the licensing of house trailer parks by the state and which have been held by the Ohio Supreme Court to preclude local licensing requirements by municipalities.⁴⁰

Even if we proceed on the theory that municipal zoning is an exercise of municipal police power, there is apparently one limitation on state intervention and that derives from the specialized meaning given by the Ohio supreme court to the phrase "general laws" appearing in art. 18, § 3. *West Jefferson v. Robinson*⁴¹ precludes a legislative enactment which would prohibit municipalities from requiring a minimum house size or a minimum lot size or other similar *prohibitions* upon the exercise of municipal power. In order for a state statute to supercede local regulation it must be "a general law" and in Ohio this has taken on a very specialized and somewhat limited meaning. As stated by Justice Taft in *West Jefferson*, the words "general laws" as set forth in § 3, art. 18, of the Ohio

³⁸ Ohio cases use "police power" in both a generic sense, in the same way the concept is employed generally in other jurisdictions, and in a more limited sense, in reference to the home rule power granted by the second clause of art. 18, § 3.

³⁹ *Tuber v. Perkins*, 6 Ohio St. 2d 155, 157, 216 N.E.2d 877, 879 (1966): "zoning is peculiarly a local problem, impracticable of solution on a state-wide basis . . ."

⁴⁰ *Anderson v. Brown*, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968).

⁴¹ 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

constitution means statutes setting forth police, sanitary or other similar regulations and not statutes which purport only to grant or to limit the legislative powers of municipal corporations to adopt or enforce police, sanitary or other similar regulations. Thus merely prescribing limitations upon municipal power will not suffice; what is needed are specific rules of conduct applicable to and enforceable against citizens of the state.⁴² Given an understanding of the *West Jefferson* requirement, we have most likely a limitation on the form which remedial legislation must take rather than any significant diminution of its substantive scope.

While *West Jefferson* may be brushed aside as a minor problem, there is substantial doubt as to the validity of the underlying premise of the foregoing exposition; to the extent that the matter has been dealt with by the Ohio Supreme Court, zoning has not been treated as if it were a "police power" but rather as a "power of local self-government." The leading case which identifies the power to zone as an exercise of "the power of local self-government" is *Morris v. Roseman*.⁴³ While not included in the syllabus, Justice Zimmerman's opinion proceeds on the premise that zoning is an exercise of "the power of local self government" and cites an earlier case, *Pritz v. Messer*⁴⁴ in support of his assumption. To the extent that the entire home rule movement in general, and the history of the movement in Ohio in particular, reflected a deep felt determination to remove from state control matters of municipal management and administration, then this grant of exclusive authority to the municipality is not entirely surprising. Moreover, to the extent that "powers of local self-government" are seen as operating upon local "housekeeping" procedures, there is substantially less danger in entrusting this power, regulated only by state and constitutional grants of individual freedom, to the municipality. In any case, it is fair to say that while the evidence is scanty, the Ohio Supreme Court, in the few instances when it has touched upon the matter, has treated zoning as a power of local self-government and therefore exempt from the conflict clause of art. 18, § 3.

VII. COMING TO GRIPS WITH EXTERNALITIES: THE STATEWIDE CONCERN DOCTRINE

The scope of the exclusive grant of power to municipalities over matters of "local self-government" depends upon the definition given to the operative terms "powers of local self-government." Once the subject is classified as one of those "powers," we know that the legislature is pre-

⁴² Some doubt about the current vitality of the *West Jefferson* definition of "general laws" is raised by Justice Taft's concurring opinion in *Cleveland Elec. Illuminating Co. v. Painesville*, 15 Ohio St. 2d 125, 132-33, 239 N.E.2d 75, 79-80 (1968).

⁴³ 162 Ohio St. 447, 123 N.E.2d 419 (1954).

⁴⁴ 112 Ohio St. 628, 149 N.E. 30 (1925).

cluded from intervening, but the constitutional language itself does not help answer the question of just what powers *are* the powers of local self-government. In the absence of clear and precise language, the Ohio supreme court inherits the obligation to make the determination on a case by case basis, hopefully with some consistency and upon articulated policy guidelines; this the court has begun to do in recent years.

Antecedent to recent cases is *Bucyrus v. Department of Health of Ohio*⁴⁵ involving a challenge by the city of Bucyrus to an order of the state department of health that the city install satisfactory means for collecting and disposing of its sewage and that it cease polluting the Sandusky River. The city challenged the state's authority, arguing that art. 18, § 3, operated as a limitation on state power. The court rejected this contention, stating that "[t]he surrender of the sovereignty of the state to the municipalities . . . with reference to sanitary regulations, was expressly limited to such sovereignty as the state itself had not or thereafter has not exercised by the enactment of general laws."⁴⁶ Thus the court's theory of decision is firmly grounded in the second clause of art. 18, § 3. The court used language in support of the policy underlying its decision which has been applied in subsequent cases which might otherwise have been declared to be governed by the "powers of local self government" clause of art. 18, § 3, and beyond the state's regulatory authority:

It is a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease within the municipality, for the municipality is of the public of the state; and it is equally a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease *without* and *in the vicinity* of its own territory, and whether, having bred disease in either situation, it disseminate it throughout the state.⁴⁷

Thus while the holding in *Bucyrus*, explainable on "police power" grounds, is not particularly helpful, the rationale for the decision introduces a frank awareness of the problem of externalities.

*Beachwood v. Board of Elections of Cuyahoga County*⁴⁸ developed more fully the concept of "statewide concern" as a standard for determining whether or not a municipality was exercising a "power of local self-government." *Beachwood* involved the question of whether or not the procedure which must be followed for the detachment of territory from a municipality is a subject within a sphere of local self government; the court answered that question with a clear and emphatic "No":

⁴⁵ 120 Ohio St. 426, 166 N.E. 370 (1929).

⁴⁶ 120 Ohio St. 426, 427, 166 N.E. 370 (1929).

⁴⁷ *Id.* at 428-29, 166 N.E. at 371 (1929) (emphasis added). If this case were decided today it is likely that the court would examine the question of whether the statute involved did in fact meet the *West Jefferson* standard of "general laws." See text accompanying note 43, *supra*.

⁴⁸ 167 Ohio St. 369, 148 N.E.2d 921 (1958).

The power of local self government . . . relates solely to the government and administration of the internal affairs of the municipality Where a proceeding . . . affects not only the municipality itself but the surrounding territory beyond its boundaries, such proceeding is no longer one which falls within the sphere of local self-government but is one which must be governed by the general law of the state.⁴⁹

The test which the court applied was result oriented:

To determine whether legislation is such as falls within the area of local self-government, the result of such legislation . . . must be considered. If the result affects only the municipality itself, with no *extra-territorial* effects the subject is clearly within the power of local self government. . . . However, if the result is not so confined it becomes a matter for the General Assembly.⁵⁰

The court then proceeded to explain the self-evident proposition that any change in a municipal boundary is of necessity going to affect the boundary of a neighboring political subdivision. Here the externality, or extraterritorial effect, to use the court's own language, has a tangible, physical impact. As such, *Beachwood* provided a suitable launching pad for the "statewide concern" doctrine, but hopefully one which would not be limited in its application to direct physical externalities.

In 1962 the Ohio supreme court once again utilized the "statewide concern" doctrine to uphold the regulatory power of the General Assembly against a challenge that such intervention was precluded by art. 18, § 3. *State ex rel. McElroy v. Akron*⁵¹ upheld Ohio Revised Code § 1547.61 as a proper exercise of the state's police power. That statute, in addition to providing for the issuing of state watercraft licenses, contained an explicit prohibition on any political subdivision of the state attempting to charge a license fee for watercraft. Quite conceivably the case could have been decided under the "police power" clause of art. 18, § 3, but the court took the opportunity to interject the observation that "public recreational facilities have become a matter of statewide concern" and to explain that "many things which were once considered a matter of purely local concern and subject strictly to local regulation . . . have now become a matter of statewide concern, creating the necessity for statewide control."⁵²

The significance of *McElroy* is largely symbolic, but it does attest to the court's continued awareness of the "statewide concern" doctrine and there is an implied invitation to reassess matters previously determined to be of strictly local concern.⁵³ Both *Beachwood* and *McElroy* were relied

⁴⁹ *Id.* at 371, 148 N.E.2d 921, 923 (1958).

⁵⁰ *Id.* (emphasis added).

⁵¹ 173 Ohio St. 189, 181 N.E.2d 26 (1962).

⁵² *Id.* at 191-92, 181 N.E.2d at 28 (1962).

⁵³ At least two text writers express doubt about the continuing validity of the state-wide concern doctrine. See J. H. CROWLEY, OHIO MUNICIPAL LAW § 5-14, (1963); J. W. FARRELL

upon in *Cleveland Elec. Illuminating Co. v. Painesville* in determining the scope of "the powers of local self government" clause.⁵⁴ The *Painesville* case tested the state's power to regulate intercity electric lines under Ohio Revised Code § 4905.65 in light of the municipality's claim that it had exclusive jurisdiction over the subject because it was a matter of "local self-government." The supreme court quoted the "extraterritorial effects" test of *Beachwood* and concluded that, in the spirit of *McElroy*, the regulation of electric transmission lines has now "become a matter of statewide concern, creating the necessity for statewide control."⁵⁵ While the *Cleveland* case might be explainable on principles similar to those underlying the commerce clause—the transmission lines carried power through Painesville to communities beyond its borders—the court nevertheless felt it appropriate to quote from the aforementioned cases, emphasizing the externalities concept.

Most recently, in *Willoughby Hills v. Corrigan*⁵⁶ the supreme court once again invoked the concept of statewide concern in upholding Ohio Revised Code § 4563.03, which provides for the establishment of multi-county airport zoning authorities. The village of Willoughby Hills challenged the state's power to zone land within its borders as a violation of art. 18, § 3, of the Ohio constitution. While noting that it need not decide the question because of evidentiary inadequacy in the trial record, the court did state that "[t]he Constitution does not preclude state action on matters of state concern, and we agree with the holding of the trial court that the safety and welfare of persons above and on the ground in the vicinity of modern day airports is a matter of state concern."⁵⁷ *Willoughby Hills* is particularly important because it alone of the cases thus far discussed involved zoning.

VIII. IN CONCLUSION: THE CHALLENGE TO THE LEGISLATURE

This series of cases suggests that if the Ohio supreme court is properly made aware of the externalities involved in exclusionary zoning, it has adequate precedent to uphold statewide intervention in what has heretofore been thought of as a matter of strictly local concern. A sufficiently persuasive case can be made for treating exclusionary zoning practices as within the "statewide concern doctrine" and the legislature ought not to be intimidated by fears of unconstitutionality when asked to adopt remedial measures for dealing with exclusionary zoning. Thus, while the home

and W. H. ELLIS, *THE LAW GOVERNING MUNICIPAL CORPORATIONS IN OHIO* § 1.26 (11th ed. 1962).

⁵⁴ 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

⁵⁵ *Id.* at 129, 239 N.E.2d at 78 (1968).

⁵⁶ 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972).

⁵⁷ *Id.* at 51, 278 N.E.2d at 665 (1972).

rule power has contributed to the growth of exclusionary zoning practices, it has not placed this subject beyond the reach of the Ohio legislature. The ambiguities of Ohio home rule law may not encourage direct legislative intervention, but the seriousness of the problem ought to provide sufficient reason for a good faith legislative attempt at finding a suitable remedy.

